No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON,
in her official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE INTER-TRIBAL TRANSPORTATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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GLOSSARY OF ACRONYMS

BIA	Bureau of Indian Affairs
FHP	Federal-aid Highway Program
FHWA	Federal Highway Administration
HTF	Highway Trust Fund
IRR	Indian Reservation Roads
ISDA	Indian Self Determination Act
NHTSA	National Highway Traffic Safety Administration
OMB PART	Office of Management and Budget, Program Assessment Review Tool
PBPN	Prairie Band Potawatomi Nation
STAA	Surface Transportation Assistance Act
TEA-21	1998 Transportation Equity Act for the 21st Century

BRIEF OF THE INTERTRIBAL TRANSPORTATION ASSOCIATION, THE MORONGO BAND OF MISSION INDIANS AND THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

> *"The Indian Reservation Roads System is among the most rudimentary of any transportation network in the United States . . . over 66% are unimproved, earth and gravel roads . . . some roads resemble roads in developing nations . . . ."*
>
> Bureau of Indian Affairs, Transportation Serving Native American Lands: TEA-21 Reauthorization Resource Paper (2003)

> *"Local public entities are refusing to use their Highway Trust Funds to reconstruct their roads/bridges when they have met their design life, forcing tribes to redirect their Indian Reservation Roads Highway Trust Funds to reconstruct these roads/bridges."*
>
> Office of Management and Budget (OMB), Program Assessment Review Tool: Indian Roads (2004)

INTEREST OF AMICI CURIAE[1]

Amicus Intertribal Transportation Association (ITA) was founded in 1993 to assist Indian tribes with the critical

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[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than *amici* or their members made a monetary contribution to the preparation or submission of this brief. Respondent is a member of ITA but has made no special contribution to the ITA or anyone else with respect to this brief.

road and other transportation issues that they confront as sovereign governments. ITA has member tribes in 13 mostly western states.[2] ITA works closely with federal and tribal officials, and to the extent possible, with state and local governments, on transportation matters central to the revitalization of tribal governments and their economies.

Amicus Morongo Band of Mission Indians is a federally-recognized Indian tribe located in south-central California. A safe and reliable roads system is essential to the Morongo Band's economic development program, which includes tourism, agriculture and mining activities. Due to the deteriorated condition of Riverside County roads serving its Reservation, the Morongo Band recently assumed responsibility for those roads and invested significant tribal resources for their reconstruction.

Amicus Three Affiliated Tribes of the Fort Berthold Reservation (Three Affiliated Tribes) are federally-recognized Indian tribes residing on the Fort Berthold Indian Reservation in North Dakota. The Three Affiliated Tribes' Transportation Department constructs roads, walkways, and other transportation facilities reservation-wide. It cooperates with the State and counties on projects for public access. The Tribes' Maintenance Department maintains more than 200 miles of federal roads on the Reservation, as well as roads to tribal members' homes. It also performs snow removal on more than eighty miles of state and county roads.

The state of Indian reservation roads is a national scandal. The neglect of those roads results from inadequate federal funding and the refusal of states to fulfill their statutory and regulatory duties to maintain their roads on and

[2] A list of ITA members is attached as Attachment A.

leading to Indian reservations.[3] This neglect has hindered economic development not only on reservations but in neighboring communities as well. Amici have a strong interest in ensuring that tribes retain the ability, as sovereign governments, to levy fuel taxes and employ other mechanisms necessary to deliver safe and adequate transportation services to their tribal members and neighboring communities.

INTRODUCTION AND SUMMARY

Roads in the United States are funded by a federal-state relationship based uniquely on motor fuel taxes. The federal motor fuel tax is gathered into the Highway Trust Fund and then distributed to states earmarked for construction. In addition, each state also has its own motor fuel tax and is legally responsible for maintaining roads built with federal funds. Although motor fuel tax rates vary, on average, roughly 50% of state transportation funding comes from Federal Highway Trust Funds, and 50% comes from state revenues largely derived from state motor fuel taxes.[4]

Unfortunately, the funding relationship that has worked so well for roads in the country generally, does not exist with respect to Indian reservations. Tribal governments receive some funding for road construction from the federal Highway Trust Fund, but it is much less on a per road mile basis than what states receive for similar roads. Moreover, congressional appropriations for maintaining federal roads on reservations are wholly inadequate. State governments

[3] For the purposes of this amicus brief, the term "state" includes all state and local governments.

[4] *See* U.S. Dep't of Transp., Federal Highway Administration. Highway Statistics, 2001. Table HF-2, Total Disbursement for Highways (January 2002).

provide little or no funding for roads construction or maintenance in Indian country despite their federal statutory obligations to do so. *See* 23 U.S.C. § 116; 23 U.S.C § 204(c).

The result has been a system of roads that "resemble roads in developing nations."[5] Faced with the complete inadequacy of funding from other sources and with road conditions that imperil the well-being of their citizens and stifle economic growth, tribal governments, as responsible sovereigns, have sought other sources of revenue to fund critical transportation projects. The most logical source – one that is expressly recognized by federal regulations – has been for tribes to levy motor fuel taxes, just as the federal and state governments do. But states like Kansas have been unwilling to let tribes do just that, even where tribes are seeking to levy taxes only on fuel sold at tribally-owned gas stations on their reservations. They have instead sought to reach into the reservations and impose their own motor fuel taxes, thereby displacing tribal governments' efforts to improve their sorely lacking transportation infrastructure.

This Court has repeatedly guarded against efforts by states to destroy the ability of tribes to act as responsible sovereign governments. Tribes have the right "to make their own laws and be ruled by them," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), and "state jurisdiction should not be asserted in a manner which 'frustrates tribal self-government.' " *Washington v. Confederated Colville Tribes*, 447 U.S. 134, 186-87 (1980)

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[5] Bureau of Indian Affairs, Transportation Serving Native American Lands: TEA-21 Reauthorization Resource Paper (2003) at 16 [hereinafter BIA Transportation Report]. Available at <http://198.104.130.237/ncai/advocacy/cd/docs/transportation-bia_tea21_reauthorization.pdf>

(Rehnquist, J.). "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." *Colville*, 447 U.S. at 153 (Opinion of the Court). That power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). As is true for other sovereigns, taxation enables "a tribal government to raise revenues for its essential services." *Id.*

This case concerns the ability of tribes to continue levying taxes in order to provide one such essential service – a safe and reliable transportation infrastructure. Kansas and its allies would have this Court rewrite existing doctrine to give states the exclusive right to finance their road infrastructure out of motor fuel taxes and preempt the tribes' ability to do the same. This Court should not lend its sanction to this effort.

ARGUMENT

I. INDIAN RESERVATION ROADS ARE GENERALLY IN SUBSTANDARD, SOMETIMES APPALLING, CONDITION

Indian Reservation Roads (IRR) are public roads located within or providing access to Indian lands.[6] The majority of roads in the IRR system are state roads (totaling 38,000 miles of road), while Bureau of Indian Affairs (BIA) and tribal roads make up the remaining 25,000 miles of the IRR system.[7]

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[6] *See* 23 U.S.C. § 101(a)(12); *see also* 25 C.F.R. § 170.5 [69 Fed. Reg. 43090, 43106 (2004)].

[7] *See* Indian Reservation Roads (IRR) Program Final Rule, Preamble, 69 Fed. Reg. 43090 (2004).

The IRR system is fundamental to Indian communities – it is intended to connect housing, health centers, schools, emergency services, employment centers and to open access for tourism and resource use.[8] Yet, the IRR system is "among the most rudimentary of any transportation network in the United States." *Id.* Over 66 percent of the IRR system contains unimproved earth and gravel roads.[9] The BIA reports that 72% of all roads in the IRR system are in poor condition. *See* BIA Transportation Report, *supra* note 5, at 16. Additionally, of the 4,394 bridges on the IRR system, 1,069 bridges are so deteriorated as to be classified as either functionally or structurally deficient. *Id.* at 12.

Poor roads endanger motorists and pedestrians. *See* BIA Transportation Report at 16. Many IRR roads are one lane, unimproved earth roads with little or no signage, inadequate safety barriers, no drainage, and no shoulders. *Id.* at 11. Not surprisingly, given these conditions, motor vehicle accidents are more likely to result in fatalities and severe injuries on IRR roads than on other roads. *See* Nat'l Ctr. for Statistics and Analysis, Nat'l Highway Traffic Safety Admin., Fatal Motor Vehicle Crashes on Indian Reservations: 1975-2002, p. 2 (2004) [hereinafter NHTSA Fatal Crashes].[10]

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[8] *Proposals to Amend the Indian Reservation Roads Program (S.281), the Indian Tribal Surface Transp. Improvement Act of 2003, and the Tribal Transp. Program Improvement Act of 2003 (S. 725): Hearing Before Senate Comm. on Indian Affairs*, 109th Cong. (2004) [hereinafter *Proposals Hearing]* (statement of Arthur Hamilton, Assoc. Adm'r for Federal Lands Highways, FHWA).

[9] *Id.*

[10] The NHTSA Fatal Crashes report is available at <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2004/809727.pdf>

The annual motor vehicle crash fatality rate on IRR roads is more than four times the national average. *See* BIA Transportation Report at 16. Moreover, fatal crashes on Indian reservation roads have *increased* by 52% over the past 25 years, while the national average has *decreased* by two percent over the same period. NHTSA Fatal Crashes at 11. Non-Indians as well as Indians are affected. In each of the years 1999-2002, one third of the on-reservation motor vehicle fatalities involved non-Indians. *See id.* at 3.

The highest rates of pedestrian injuries and deaths in the nation also occur on these roadways due to the "lack of sidewalks....posted speed limit signs, stop lights, [and] pedestrian warning signs." U.S Dep't of Transp., Pedestrian Safety in Native America, 7-8 (2004) (finding in 2001 that the age-adjusted pedestrian crash mortality rate is 3.9 per 100,000 population for Native Americans, while the national age-adjusted mortality rate is 1.68).[11]

In addition, the atrocious condition of IRR roads hinders the delivery of tribal governmental services, making travel for tribal members to health clinics, schools, employment centers and stores difficult, dangerous and, at times, impossible. *See* BIA Transportation Report at 14.

On the Navajo Nation Reservation, for example, more than three quarters of all roads are unpaved and many are completely impassable in poor weather.[12] Of the 173 bridges

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[11] U.S Dep't of Transp., Pedestrian Safety in Native America is available at <http://www.walkinginfo.org/pdf/FHWA/Ped_Safety_in_Native_America.pdf>

[12] *The Indian Reservation Roads Program, House Transp. and Infrastructure Comm., Subcomm. on Highways and Transit: Hearing on Federal Lands Highway Program*, 107th Cong. 5 (2002) [hereinafter *IRR Program Hearing*] (statement of Andrew Simpson, Navajo Nation).

on the Navajo Reservation, 51 are classified as deficient and pose safety hazards due to excessive wear. *Id.*

Travel to Navajo health clinics can involve trips over a hundred miles for some tribal members. "Dirt roads, deteriorating paved roads, and treacherous bridges make their journeys more difficult." *Id. at 3.* Emergency rescue and fire suppression crews are slowed by poor roads and at times cannot get their vehicles to the scene. *Id. at 2-3.* Police have greater difficulty patrolling and enforcing laws. *Id.*

Students spend inordinate amounts of time in school buses traveling dangerous and occasionally impassible roads. *See Bureau of Indian Affairs School Constr. Oversight Hearing Before Senate Comm. on Indian Affairs,* 105th Cong., 2 (1998) (statement of Thomas Atcitty, President, Navajo Nation) ("many children ride over fifty miles one way, with a number of stops to pick up other students.") Many of the school bus routes lack basic safety features, such as shoulders and guardrails. *See Proposals Hearing, supra* note 8, at 3 (statement of Joe Shirley, Jr. President, Navajo Nation). One school bus route on the Navajo Reservation includes a 12-mile stretch of one-lane dirt road. *Id.*

IRR road conditions likewise impede all types of reservation-based economic development. Tribal economic activities – tourism, agriculture, energy production, manufacturing, mineral extraction and timber harvesting – require moving people and goods. BIA Transportation Report at 2. Deteriorated roadways deter entry to the reservation, delay deliveries and add wear to vehicles.[13] Impassible roads

[13] *IRR Program Hearing, supra* note 12, at 1-2 (statement of James Garrigan, Director of Tribal Roads Program, Red Lake Band of Chippewa Indians).

stop commerce altogether.[14] As the Principal Chief of the Cherokee Nation Chadwick Smith has testified, "prospective investors are justifiably concerned that they will have to put up with third world type transportation infrastructure just to get their goods and services to market." *Id.*

Poor road maintenance conditions are compounded by geographic remoteness and the few access roads available. A Washington State Tribal Transportation Survey found that about a fourth of 29 tribes surveyed have only one access road. Three of those tribes surveyed reported chronic road closures. *See* Rick Galloway, Washington State Tribal Transportation Survey (2004) [circulating draft]. In one particularly vivid illustration of the problem, road conditions on the Tulalip Reservation just north of Seattle are so poor that in March 2005, the U.S. Postal Service suspended mail delivery "until the road situation can be resolved." Letter from U.S. Postal Service to Postal Customers of March 15, 2005. Tribal economic development, the effective delivery of tribal governmental services, and the safe and efficient transportation of tribal members and non-Indians alike cannot take place under such conditions.

[14] *IRR Program Hearing, supra* note 12, at 2 (statement of Chadwick Smith, Principal Chief, Cherokee Nation).

II. WHILE THE FEDERAL GOVERNMENT IS EXTENSIVELY INVOLVED IN IMPROVING AND MAINTAINING INDIAN RESERVATION ROADS, THE FUNDING LEVELS ARE FAR BELOW WHAT IS NECESSARY TO SUSTAIN A SAFE AND PRODUCTIVE ROADS SYSTEM

There are two major federal highway programs funded by the Federal Highway Trust Fund -- (1) the Interstate Highway Program and (2) the Federal-aid Highway Program (FHP). The FHP applies to all roads not covered by the Interstate Highway Program. Only the FHP is relevant here. As we shall see, the FHP includes as a subprogram the Indian Reservation Roads (IRR) Program.

Developing an effective national roads infrastructure has been a policy priority of the federal government since early in the 20th Century. By 1916, Congress had enacted a federal-aid roads program to provide funding to states to help them construct roads to meet federal design and construction standards. Pub. L. No. 64-156, ch. 241, 39 Stat. 355 (1916).

The 1916 federal-aid roads program set the course for federal-state cooperation in roads construction. Yet, it was the Federal Highway Act of 1956[15] and its companion legislation, the Highway Revenue Act of 1956[16] that gave this federal-state cooperative framework financial muscle. The Highway Revenue Act established the Federal Highway Trust Fund and dedicated federal fuel tax collections to highway and road improvements. The effect was to launch the construction of a system of highways that was extraordinarily successful.[17]

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[15] Pub. L. No. 84-627, ch. 462, 70 Stat. 374 (1956).
[16] 26 U.S.C. § 4041 note.
[17] Prior to 1956, gas tax receipts were directed to the General Fund of the U.S. Treasury. For a policy history of road and highway system development in the United States, *see* Richard L. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation, 60 Public Roads*, 1 (Summer 1996), *available at* <http://www.tfhrc.gov/pubrds/summer96/p96su2.htm>.

The Federal Highway Administration (FHWA) administers the program implementing the Federal-aid Highway Act (the Federal-aid Highway Program, FHP) pursuant to congressional authorization (generally every six years). These statutory authorizations apportion Federal Highway Trust Funds among the states. *See* 23 U.S.C. § 104(b). As existing sections of federally funded highways deteriorate, certain repair, reconstruction, and rehabilitation projects become eligible for federal funds. *See* 23 U.S.C. § 103(b)(6).

The Indian Reservation Roads (IRR) Program was established in 1928. 25 U.S.C. § 318a. The IRR Act authorized the Secretary of Agriculture (who had responsibility for federal roads at the time) to cooperate with state highway agencies and the Department of the Interior (DOI) to improve and maintain roads serving Indian lands. These IRR roads, however, were not eligible to receive Federal Highway Trust Funds until 1983. The enactment of the Surface Transportation Assistance Act (STAA)[18] that year made Federal Highway Trust Funds available for construction of roads within the IRR system. 23 U.S.C. § 204.

The IRR Program is administered jointly by the BIA and the FHWA. Its purpose is to provide:

> " . . . safe and adequate transportation and public road access to and within Indian reservations, Indian lands and communities for Indians and Alaska Natives, visitors,

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[18] Pub. L. No. 97-424, 96 Stat. 2097 (1983).

> recreational users, resource users and others, while contributing to economic development, self-determination and employment of Indians and Alaska Natives." Indian Reservation Roads Program, Final Rule, 69 Fed. Reg. 43,090 (July 19, 2004).

Since the STAA, tribes have become increasingly integrated into the Federal-aid Highways Program framework and have become participating governments in the system of federal-state-tribal cooperation.[19] Funding for the IRR Program, however, has lagged far behind where it should be, comparatively and absolutely.

As discussed in Section III, *supra*, there is an enormous and largely unmet need for transportation infrastructure on Indian reservation lands. Available data indicate that there is currently an estimated $11.8 billion backlog of improvement needs for BIA roads and $9.1 billion backlog for State and tribal roads. *See* BIA Transportation Report at 17.

In the history of the IRR program, reservation roads have not received the level of funding needed to improve their quality equivalent to non-Indian roads. Although reservation roads comprise nearly 3% of the Federal-aid Highway Program, less than 1% of Federal aid has been allocated to

[19] *See, e.g.*, 23 U.S.C. § 134 and § 135 (and implementing regulations at 23 C.F.R. Part 450) (requiring inclusion of tribal governments in metropolitan and state-wide transportation planning); 25 C.F.R. § 170.100-108 and 170.424 [69 Fed. Reg. 43,090, 43,107-108, 43,128] (tribal-state consultation for developing transportation improvement programs); 25 C.F.R. § 412-415 [69 Fed. Reg. 43,090, 43,127-128] (tribal-state and public involvement in long-range transportation planning); and 25 C.F.R. § 170.435-441 [69 Fed. Reg. 43,090, 43,129] (tribal governmental role in public hearing for roads development).

Indian roads.[20] If the IRR program were to receive the nearly 2.63% of funding that represents the percentage of Indian reservation road mileage in the federal highway system, the IRR program would have been fully funded at $4.7 billion from fiscal years 1998-2003. *Id.* The current IRR funding level, however, is authorized only at $1.6 billion for those fiscal years. *Id.*

At this funding level, the IRR Program receives only about half the amount per road mile that states receive. For instance, in 2001, the Transportation Equity Act for the 21st Century[21] (TEA-21) authorized payments of $38 billion for transportation programs, or $9,600 per state road mile, while the IRR program was allocated $275 million, or $4,900 per mile.[22] While the TEA-21 represented a funding increase for the IRR program, that increase amounted to less than 22 percent -- not even matching the cost of inflation over the six year authorization -- while funding to states increased forty percent for the same period.[23]

Considering IRR Program funds in the aggregate, moreover, does not describe how miniscule these funds may be once they are distributed among 562 federally recognized Indian tribes. The 2004 IRR Program Final Rule, which went

[20] U.S. Dep't of Transp., Federal Highway Administration, TEA-21, A Summary (1998).

[21] Pub. L. No. 105-178, 112 Stat. 107 (1998).

[22] *See* U.S. Dep't of Transp., Highway Statistics: 2001, Table FA-21, Federal Receipts and Disbursements for Highways (2002) [hereinafter DOT Highway Statistics]. Because the IRR system provides access to services for a substantial residential population, IRR system roads are more like state road systems than they are like roads of other federal agencies. *See* BIA Transportation Report at 9.

[23] *See* Richard Rolland & Dick Winchell, *State and Tribal Relations in Transportation in the Tribes and the States: Geographies of Inter-Governmental Interaction* 143 (Bays and Fouberg eds., 2002).

into effect in November 2004, established a funding distribution formula based on three factors pertinent to each tribe: the cost required to bring the tribe's existing IRR roads up to adequate standards; the number of vehicle miles traveled on these roads; and the size of the population served. *See* 25 C.F.R. § 170.200 [69 Fed. Reg. 43,090, 43,115]. Under this formula, many tribes receive allocations too small to even complete a single project.[24]

In addition, the lack of federal funds for the maintenance of IRR roads, as opposed to their construction, literally leaves many reservation roads "in the mud." Because Federal Highway Trust Funds may not be used for road maintenance, funding to maintain BIA roads on the IRR system is appropriated through annual Department of Interior Appropriations Acts. *See* BIA Transportation Report at 21. The BIA receives roughly $27 million annually for IRR maintenance. *Id.* at 22. However the BIA estimates that nearly five times the amount of funding currently available, or $120 million, is needed to adequately maintain BIA roads per year. *Id.* The road maintenance budget for the IRR program has in fact decreased in recent years from $30.5 million in 1990. *Id.*

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[24] The regulations provide a range of mechanisms to address the inadequacy of available funding. *See, e.g.*, 25 C.F.R. 170.205(a)(1) [69 Fed. Reg. 43,090, 43,116] (establishing a special high priority project funding pool for tribes whose annual allocation is insufficient to complete its highest priority project); § 170.300 [69 Fed. Reg. 43,090, 43,119] (IRR funds may be used to secure loans or repay debt financing instruments); § 170.301 [*Id.*] (IRR funds may be used as matching funds to leverage other federal, state, or local funds); § 170.302 [*Id.*] (allowing BIA regional offices to borrow IRR funds from each other to assist other BIA regional offices to finance the completion of an IRR project); and § 170.932 [69 Fed. Reg. 43,090, 43,141] (identifying alternative funding sources, including tribal fuel taxes and licensing and registration fees).

Tribal leaders have testified to Congress as to the inadequacy of roads program funding, with emphasis on the insufficiency of the BIA Maintenance Program to meet existing needs.[25] The BIA's allocation of maintenance funding is less than $1,000 per mile (compared to estimates of $4,000-$5,000 per mile used by states to maintain their non-IRR roads).[26] The 2004 Office of Management and Budget (OMB) Program Assessment Review Tool (PART) affirmed tribal concerns, finding that "the requested funding level [for road maintenance] is not based on local or national program needs and is inadequate to meet extensive maintenance backlogs." OMB PART at 141.[27] Moreover, the OMB study documented that BIA's federal partner in the IRR program, the FHWA, believes the BIA Maintenance Program fails to address the needs. *Id.* at 144.

In part to address these funding disparities, TEA-21 provided significant new terms to enhance tribal government participation in the IRR program so as to "render [federal] services more responsive to the needs" of Indian communities. 25 U.S.C. § 450a(a). TEA-21 clarified that Indian tribes may contract for and perform IRR Program activities pursuant to the Indian Self-Determination and Education Assistance Act.

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[25] See, e.g., *IRR Program Hearing, supra* note 12 (statement of Loretta Bullard, President, Kawerak, Inc.)(recommending increasing the BIA Maintenance Funding Program to $100 million); *Id.* (statement of Garrigan) (noting that inadequate funding has caused premature failure of many IRR system roads); *Id.* (statement of Simpson)(Navajo's road maintenance request funded at 30% of need).

[26] Among the most poorly maintained roads in Indian Country are neglected state roads that are part of the IRR system. *See, e.g.*, OMB PART at 142 (states ignore their responsibility to maintain state roads on and near Indian lands as required by 23 U.S.C. § 116(a)); *and* discussion in Section V below.

[27] The OMB PART for Indian Roads is available at <http://www.whitehouse.gov/omb/budget/fy2006/pma/interior.pdf>

25 U.S.C. § 450 *et seq.* (usually referred to as the Indian Self-Determination Act or ISDA). Although such contracting was available prior to enactment of TEA-21, since 1998 the percentage of IRR Program activities carried out by tribes has substantially increased.[28]

Indian tribes have contracted under the ISDA for such IRR Program activities as transportation planning, road and bridge design, and construction. Several Indian tribes, including the Cherokee Nation of Oklahoma and the Red Lake Band of Chippewa Indians in Minnesota, have entered self-governance agreements with the BIA to carry out the entire IRR Program.[29]

Reflecting the increasing tribal governmental role in transportation infrastructure activities, TEA-21 required extensive revision of the IRR Program regulations by a tribal-federal negotiated rulemaking committee. *See* 23 U.S.C. § 202(d)(2)(c). The IRR Program Final Rule, in addition to establishing a funding formula to distribute IRR Program funding among tribes, clarified procedures for transferring federal program functions to tribes under the ISDA, and set out the government-to-government planning framework for coordination between tribes and states.[30] Significantly, these

[28] *See* BIA Transportation Report, at 27. In 1998, 25% of IRR program functions were being implemented by tribes under ISDA agreements. By 2003, nearly half of all IRR program activities were being administered by tribes. *Id.*

[29] *See Proposals Hearing, supra,* note 8) (statement of Hamilton) (noting that ten tribes administer the IRR Program pursuant to self-government agreements).

[30] *See* 25 C.F.R. Part 170, Subpart C [69 Fed. Reg. 43,090, 43,115-126] (funding formula); 25 C.F.R. Part 170, Subpart E [69 Fed. Reg. 43,090, 43,133-137] (program service delivery under the ISDA); 25 C.F.R. §§ 170.100-108, 170.412-415, 170.424, 170.435-441 [69 Fed. Reg. 43,090,

regulations specifically identify tribal fuel taxes as an additional funding source for their tribal transportation programs. *See* 25 C.F.R. § 170.932(d) [69 Fed. Reg. at 43141].

While the federal IRR and BIA Road Maintenance Programs are critical for roads infrastructure on and near Indian lands, funding levels are not enough to achieve the program purposes. If tribal communities are to enjoy roads as safe and adequate as similar-class state roads, for the benefit of tribal economic development and self-government, tribal governments desperately need to rely on other sources of funding.

III. SOME TRIBES MUST SPEND MONEY ON STATE ROADS BECAUSE MANY STATES HAVE FAILED TO FULFILL THEIR LEGAL RESPONSIBILITIES TO FAIRLY ALLOCATE FEDERAL AND LOCAL FUNDS TO CONSTRUCT AND MAINTAIN INDIAN RESERVATION ROADS

Nationwide, much of the IRR system consists of state roads on and leading to Indian reservations.[31] Under the Federal-aid Highway Program, states have legal obligations with respect to the improvement and maintenance of these roads. *See* 23 U.S.C. § 204(c); 23 U.S.C. § 116(a). Typically, however, the states have not adequately fulfilled their responsibilities. *See* OMB PART at 139:

43,107-108, 43,127-128, 43,129] (tribal-state coordination and public involvement in transportation planning).

[31] *See* 69 Fed. Reg. 43,090 (2004) (stating that the IRR system is comprised of 25,000 miles of BIA and tribal roads, and 38,000 miles of state, county and local government roads).

> "States, counties and local governments constructed over 38,000 miles of roads on reservations using [highway trust funds] . . . [yet] local public entities do not maintain their roads/bridges."

The Federal-aid Highway Program requires states to allocate "a fair and equitable share" of their apportionment of federal highway trust funds for the construction and improvement of Indian reservation roads in their respective states. 23 U.S.C. § 204(c) (before a state may receive IRR Program funds for a state road, the Secretary of Transportation must determine that such IRR funding is "*supplementary to and not in lieu* of the [state's] obligation" to provide such funds from the state's allocation under 23 U.S.C. § 104) (emphasis added). By statute, the Secretary of Transportation is authorized to work with states and the Department of Interior to facilitate construction projects that fulfill this state obligation. *See* 23 U.S.C. § 120(f). Despite the states' statutory responsibilities and their eligibility for federal credits and financial off-sets when they allocate their funding to their IRR roads, *see* 23 U.S.C. § 204(d) (appropriations credited to state and local governments cooperating in the construction of IRR projects), *and* 23 U.S.C. § 120(b)(2) (adjusting the federal share payable to states to compensate for the percentage of non-taxable Indian land in the state), states rarely use their federally-allocated road funds for such Indian reservation roads. *See* OMB PART at 139, which reports:

> "[states] are refusing to use their HTF [highway trust fund] funding to reconstruct their roads/bridges when they have met their design life, forcing tribes to redirect their IRR HTF funding to reconstruct these roads/bridges."

States are also legally responsible for the maintenance of their roads constructed using Federal-aid Highway Program funds, including state-owned IRR roads. *See* 23 U.S.C. § 116(a) ("It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts"); *see also* 23 U.S.C. §116(c) (providing for the Secretary to withhold approval for further projects for failure of a state to maintain its roadways).

While use of the state's allocation of Federal Highway Trust funds for IRR roads construction is unusual, it is even more uncommon for states to dedicate their locally-generated revenues to maintain those roads – in spite of their legal responsibility to do so. *See, e.g., Oversight of the Indian Reservation Roads Program: Hearing Before Senate Comm. on Indian Affairs,* 106th Cong. (1999) (statement of Baracker) ("The lack of proper maintenance is becoming evident in the frequency of reconstruction activities because roads are deteriorating prematurely"); *and* OMB PART at 142 (although state IRR roads "are required to be maintained by law . . . BIA has no way to enforce [state compliance]").[32]

Because state performance of road improvement and maintenance responsibilities on their IRR roads has been substandard, tribes have been forced to use their limited tribally-generated resources to salvage those roads rather than to continue being faced with the hazards, closures and/or

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[32] The new IRR Program regulations provide terms for the BIA to implement 23 U.S.C. § 116(c), which call for the DOI to report state failures to maintain roads to FHWA. *See* 25 C.F.R. § 170.811 [69 Fed. Reg. 43,090, 43,138-139](triggering the provisions to permit the Secretary of Transportation to withhold approval of further projects to a state until the neglected road has been put into a proper condition).

inconveniences these roads pose.[33] Amicus Morongo Band of Mission Indians recently invested $1.3 million in tribal revenues in addition to nearly $500,000 in IRR Program funds to rebuild a network of neglected Riverside County roads on its reservation.[34] Bringing these roads up to standard required the Morongo Band to resurface, widen and install flood controls on these roads.[35] The PBPN, has likewise assumed responsibility for the maintenance of 55 additional miles of state roads within its reservation in the past decade. *See* Ramirez Aff., JA at 79, ¶ 2.

More generally, tribes, in the exercise of their governmental authority, have increasingly sought to address the dire roads situations on their reservations themselves. But, like other governments, tribes cannot fund the infrastructure projects necessary to provide safe and reliable transportation infrastructure for their citizens and those who choose to do business with them without adequate sources of funding.

Faced with inadequate federal funding and the abdication of responsibility by the states, tribes like the PBPN have accordingly levied motor fuel taxes, the proceeds of which they have dedicated entirely to road maintenance and improvements. In so acting, the tribes have done exactly what the federal and state governments do, and have acted in

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[33] LeRoy Gishi, BIA Division of Transportation, Comments at Northern Plains Tribal Technical Assistance Program Meeting (December 2004).

[34] *See* Mike Cruz, *Morongos Aim to Limit Entry*, San Bernadino County Sun, June 1, 2005.

[35] *Id.* Ironically, public use of these roads has increased dramatically since their reconstruction. Commuters and commercial traffic are now using these tribal roads to by-pass congested arteries on major thoroughfares. This new level of traffic is overburdening the design standards for these roads, causing the Tribe to consider mechanisms to deter traffic and preserve its road investment.

precisely the manner condoned by federal regulations. *See* 25 C.F.R. § 170.932(d) [69 Fed. Reg. at 43141].

Kansas, having chosen to neglect its own obligations with respect to reservation roads, would nullify this responsible exercise of tribal sovereignty. The state and its allies would deny the PBPN and other tribes the ability to raise any revenue to fund desperately needed roads projects. In doing so, they would strike at the heart of tribal sovereignty, impermissibly interfering with the ability of tribes to "raise revenues for ... essential services," *Merrion*, 455 U.S. at 137, and more broadly, with their ability to govern themselves. *See Bracker*, 448 U.S. at 142; and *Colville*, 447 U.S. at 186-187 (Rehnquist, J.). Their attack on the ability of tribes to act as responsible governments, contrary as it is to established doctrine, cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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ATTACHMENT A

INTERTRIBAL TRANSPORTATION ASSOCIATION MEMBERSHIP 2005

TRIBES & COMMUNITIES

1. Absentee Shawnee Tribe of Oklahoma
2. Apache Tribe of Oklahoma
3. Cherokee Nation
4. Citizen Band Potawatomi Tribe of Oklahoma
5. Comanche Tribe of Oklahoma
6. Confederated Salish & Kootenai Tribes
7. Confederated Tribes of the Warm Springs Reservation
8. Fort Belknap Indian Community (Gros Ventre & Assiniboine Tribes)
9. Jamestown S'Klallum Tribe
10. Kawerak, Inc. (Consortium of Native Villages in the Bering Straits Region)
11. Kaw Tribe of Oklahoma
12. Kootenai Tribe of Idaho
13. Navajo Nation
14. Nez Perce Tribe of Idaho
15. Shoshone-Bannock Tribes
16. Oneida Nation of Wisconsin
17. Prairie Band Potawatomi Tribe of Kansas
18. Salt River Pima-Maricopa Indian Community
19. San Ildefonso Pueblo
20. Arapaho Tribe & Eastern Shoshone Tribe of the Wind River Reservation
21. Southern Ute Tribe
22. Tanana Chiefs Conference
23. Village of Eyak

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